IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

Nos. 232 and 233

UNITED STATES OF AMERICA,

Petitioner,

—v.—

DAVID PAUL O'BRIEN,

Respondent.

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—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING AND PETITION FOR STAY OF MANDATE PENDING REHEARING

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Pursuant to Rule 58(1) of the Rules of this Court, David Paul O'Brien, the respondent in No. 232, and the petitioner in No. 233 (hereinafter "petitioner"), respectfully prays for a rehearing of the judgment of this Court dated May 27, 1968. Petitioner likewise respectfully prays, pursuant to Rule 59(2) of the Rules of this Court, for an order staying the mandate of this Court pending the determination of this petition for rehearing.

In accordance with Rule 58(1) the grounds of this petition for rehearing are briefly and distinctly stated as follows:

1. Petitioner, who was convicted by the United States District Court for the District of Massachusetts, for violation of the 1965 amendment to Title 50 App. U. S. C. §462(b)(3), which made it a felony to knowingly destroy or knowingly mutilate a Selective Service certificate, was sentenced, pursuant to the Federal Youth Corrections Act, 18 U. S. C. §5010(b), "to the custody of the Attorney General for a maximum period of six years for supervision and treatment." *United States* v. *O'Brien*, 36 U. S. L. Week 4469, Opinion of this Court May 27, 1968, footnote 2.[1]

2. In the appeal of his conviction to the United States Court of Appeals for the First Circuit, petitioner urged among other grounds that imposition of the six year maximum sentence violated his constitutional rights in that:

(a) The imposition of an indeterminate term of imprisonment with a maximum of six years of deprivation of liberty for the act of destruction or mutilation of a Selective Service certificate is punishment so excessive and disproportionate, as to constitute cruel and unusual punishment in violation of the Eighth Amendment; and

(b) the imposition of an indeterminate sentence of up to six years under the Federal Youth Corrections Act for burning a Selective Service registration certificate as a symbolic expression of protest against war, accompanied

[1] There is no other mention of the six year sentence in any of the three opinions written in this case.

by statements of the sentencing judge that the duration of the confinement will depend on the defendant's changing his beliefs and associations, is an unconstitutional abridgment of freedom of expression and association protected by the First Amendment, and constitutes cruel and unusual punishment forbidden by the Eighth Amendment.

3. The First Circuit held the statute unconstitutional, *O'Brien* v. *United States,* 376 F. 2d 538 (1st Cir. 1967) on grounds other than those urged with respect to the sentence and the manner of sentencing. Indeed, the First Circuit did not reach or discuss these grounds. The First Circuit did, however, find petitioner guilty of the "lesser included offense" of violation of the Selective Service regulation requiring possession of one's Selective Service certificate. However, the First Circuit observed that the sentence might have been imposed upon the basis of a statute held to be unconstitutional and that to "measure the sentence by the nature of his communication, would be to punish defendant, pro tanto, for exactly what the First Amendment protects". 376 F. 2d at 542. Consequently, the First Circuit affirmed the conviction, but held "that fairness to the defendant requires that he be resentenced upon considerations affirmatively divorced from impermissible factors." *Ibid.* The remand direction of the First Circuit was that the District Court "vacate the sentence, and . . . resentence as it may deem appropriate in the light of this opinion." *Ibid.*

4. The Government petitioned this Court for a writ of certiorari urging that the First Circuit erred in holding the statute unconstitutional, the view adopted by this Court's judgment of May 27, 1968. The Government's petition for

certiorari did not raise any of the questions concerning sentence and sentencing. O'Brien cross-petitioned this Court for a writ of certiorari. The cross petition was limited to the contention that O'Brien could not be constitutionally convicted of violation of the non-possession regulation under the lesser included offense theory. O'Brien's cross-petition did not urge any aspect of the questions of sentence or the manner of sentencing because the posture of the case at such time was that the existing sentence had been vacated. Under the circumstances, O'Brien's counsel did not feel it appropriate to cross-petition this Court on an issue which was not then before the Court.

5. However, in the preparation of O'Brien's brief before this Court, O'Brien's counsel reasoned that it was possible that this Court, if it reversed the First Circuit on the main grounds urged by the Government, might then be prepared to consider the constitutional questions raised in connection with the sentence and the manner of sentencing. Therefore, arguments in support of such contentions were set forth as Point VI in O'Brien's brief (pp. 71 through 78). For the convenience of the Court, Point VI of such brief is reprinted verbatim as an appendix to this petition.

6. The judgment of this Court, reversing the First Circuit, reinstated the judgment and sentence of the District Court. This Court did not consider the point concerning sentence and the manner of sentencing set forth in Point VI of O'Brien's brief, apparently for the reason set forth in footnote 31 at the conclusion of the Chief Justice's opinion:

> "31 The other issues briefed by O'Brien were not raised in the petition for certiorari in No. 232 or in the

cross-petition in No. 233. Accordingly, those issues are not before the Court."[2]

7. Consequently, questions of constitutional import concerning a six year maximum sentence for the burning of a Selective Service certificate and the manner of the imposition of such sentence were not ruled on either by the First Circuit or by this Court. Upon the issuance of the mandate of this Court, petitioner will therefore be subject to imprisonment for up to six years without the constitutionality of his sentence ever having been determined.

8. Counsel for petitioner have attempted to verify and can advise the Court on their best information and belief that such six year maximum sentence is the harshest sentence yet imposed on any person convicted of this offense. Other sentences imposed have ranged from sentences of probation, *United States* v. *Smith*, 249 F. Supp. 515 (S. D. Iowa 1966), aff'd 368 F. 2d 529 (8th Cir. 1966); *United States* v. *Wilson* (unreported, S. D. N. Y. 1966); to sentence of six months, *United States* v. *Edelman, et al.* (unreported, S. D. N. Y. 1966), aff'd 384 F. 2d 115 (2d Cir. 1967) cert. den. *United States* v. *Cornell, et al.*, 36 U. S. L. Week 3473 (June 10, 1968); to a one-year sentence, *United States* v. *Sullivan* (unreported, S. D. N. Y. 1966); to a sentence of 2½ years imposed for violation of conditions of probation of a prior suspended sentence, see *United States* v. *Miller*, 249 F. Supp. 259 (S. D. N. Y. 1965) aff'd 367 F. 2d 72 (2d

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[2] There was likewise no discussion of either the sentence or the manner of sentencing during oral argument. O'Brien's counsel intended to reach these points, but because of the interest of members of the Court in questioning counsel on other aspects of the case the time for argument concluded before counsel had an opportunity to raise these questions.

Cir. 1966) cert. den. 386 U. S. 911 (1967), motion for leave to file petition for rehearing den. 36 U. S. L. Week 3474 (June 10, 1968).

9. It is respectfully submitted that these questions are serious and substantial. It can reasonably be expected that any sentences of long duration which may be imposed by District Courts for violations of either the burning statute, or the non-possession regulation, will invariably raise the question of constitutionality under the Eighth Amendment. Recent opinions of this Court this Term have shown this Court's continuing consideration of the importance of sentencing procedures under contemporary standards. See *Witherspoon* v. *Illinois*, 36 U. S. L. Week 4504 (June 3, 1968); *United States* v. *Jackson*, 36 U. S. L. Week 4277 (April 8, 1968). It is therefore a matter of public importance in the administration of the penal statute now held constitutional for this Court to dispose of these questions at this time, in a case where they have been specifically and legitimately raised.

CONCLUSION

For the foregoing reasons petitioner respectfully prays:

1. That the petition for rehearing be granted on the limited point set forth herein; or, in the alternative,

2. that this Court modify its prior judgment and direct that the case be remanded to the Court of Appeals to consider constitutionality of the sentence and the manner of sentencing; and

3. that pursuant to Rule 59(2) the mandate of this Court be stayed pending the determination of this petition.

Respectfully submitted,

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Certificate of Counsel Pursuant to Rule 58

I, MARVIN M. KARPATKIN, counsel for petitioner, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

MARVIN M. KARPATKIN

APPENDIX

POINT VI

Should the Court reverse the determination of unconstitutionality made by the Court of Appeals it should then hold that the sentence imposed on respondent was unconstitutional both in its term and in its manner of imposition.

A. The imposition of an indeterminate term of imprisonment with a maximum of six years of deprivation of liberty for the crime of destruction or mutilation of a Selective Service certificate is punishment so shockingly excessive, disproportionate, cruel, unusual and inhumane as to constitute cruel and unusual punishment in violation of the Eighth Amendment.

APPENDIX

The maximum term of imprisonment authorized by the amended statute is five years. 50 U. S. C. App. §462(b). On the other hand, the maximum term authorized by the Federal Youth Corrections Act is six years, the first four of which may be under incarceration. 18 U. S. C. §5010(b), §5017(c). There appears to be a conflict between certain decisions which hold that under these circumstances the maximum permissible term is five years, and other decisions which hold that the whole six years authorized by the Youth Corrections Act is the maximum. Compare *Chapin* v. *United States*, 321 F. 2d 900 (10th Cir. 1963); *Workman* v. *United States*, 337 F. 2d 226 (1st Cir. 1964), with *Rogers* v. *United States*, 326 F. 2d 56 (10th Cir. 1963); *Tatum* v. *United States*, 310 F. 2d 854 (D. C. Cir. 1962).